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February 7, 1994

William F. Caton
Acting Secretary
Federal Communications Commission
Room 242
1919 M Street, NW
Washington, D.C. 20554

RE: CC Docket No. 93-162, DA 93-951
Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access

Dear Mr. Caton:

Enclosed for filing are an original and four copies of the Opposition of the Association for Local Telecommunications Services to the Petition for Reconsideration of BellSouth Telecommunications, Inc. with respect to the above captioned Common Carrier Bureau Action. Also enclosed is a copy marked "receipt copy" to be stamped as received and returned to us.

Attached to the Opposition to the Petition for Reconsideration is a Motion to Accept Late Filed Pleading in this matter.

If you have any questions concerning this filing, please contact the undersigned.

Respectfully submitted,

W. Theodore Pierson, Jr.
Counsel for ALTS

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

In the Matter of	)	
	)	
Local Exchange Carrier's Rates,	)	CC Docket No. 93-162
Terms and Conditions for Expanded	)	Phase I
Interconnection for Special Access	)	

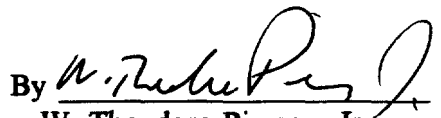
Motion to Accept Late Filed Pleading

The Association for Local Telecommunications Services ("ALTS") respectfully requests the Commission to accept the attached Opposition to BellSouth's Petition for Reconsideration filed one day out of time.

The filing period ended on February 4, 1994, however, due to circumstances beyond ALTS' control, it was unable to file within the required period. ALTS has served BellSouth by facsimile and Federal Express, and has served the Commission by hand. Therefore, ALTS respectfully submits that the slight delay in filing its response will not unduly prejudice the interests of the Commission or of the other parties in this proceeding. ALTS' pleading will provide necessary assistance to the Commission in addressing the issues raised by BellSouth. ALTS respectfully suggests that the Commission consider its response in order to ensure a full and complete record in this proceeding.

Therefore, ALTS requests the Commission to grant its Motion to Accept Late Filed Pleading and accept for inclusion in the record in this proceeding ALTS' Opposition to BellSouth's Petition for Reconsideration.

Respectfully submitted,

By 

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February 7, 1994

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In the Matter of	)	
	)	
Local Exchange Carrier's Rates,	)	CC Docket No. 93-162
Terms and Conditions for Expanded	)	Phase I
Interconnection for Special Access	)	

OPPOSITION TO BELLSOUTH'S PETITION FOR RECONSIDERATION

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February 7, 1994

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SUMMARY

The Association for Local Telecommunications Services ("ALTS") opposes the BellSouth Petition for Reconsideration ("BellSouth Petition") of the Commission's Interim Prescription Order in Docket No. 93-162 rejecting the local exchange carriers' ("LECs'") proposed rates for special access expanded interconnection and imposing an interim rate prescription ("*Interim Prescription Order*").

BellSouth claims that Section 204(a) requires the Commission to permit proposed tariffs to become effective if the investigation proceeding has not been concluded and an order made within the suspension period. BellSouth's conclusion is based upon an erroneous factual premise that mischaracterizes the Commission's *Interim Prescription Order* findings. Contrary to BellSouth's claims, the Commission conducted its investigation in total compliance with the Act's requirements. At the end of the suspension and investigation period, the Commission unequivocally and repeatedly concluded that the LECs' proposed rates were unjust, unreasonable and, therefore, unlawful. This finding permitted it to reject the tariffs under Section 204 of the Act.

BellSouth also argues that the Commission exceeded its statutory authority by prescribing interim rates under Section 4(i) and ancillary to its Section 205 authority to prescribe rates. BellSouth maintains that the Commission has not yet conducted the hearing required by Section 205 and that the two-way adjustment mechanism, by which the Commission will later adjust the interim rates, indicates it may later conclude that the interim rates are not just and reasonable. To the contrary, the Commission's proceeding satisfied both requirements. The LECs had a full opportunity for a hearing. Moreover, BellSouth's

interpretation of Section 205 ignores the latitude afforded the Commission by that section which permits the Commission to determine and prescribe just and reasonable, minimum or maximum rates.

The Commission principally relied, and has relied in the past, on Section 4(i) to impose interim rates. BellSouth recognizes that *Lincoln Telephone v. FCC* undercuts its arguments and contends that the Commission's reliance on it is misplaced. BellSouth's claim fails because here, as in *Lincoln*, there were no tariffs in effect that permitted expanded interconnection at the time that the Commission prescribed interim rates.

Adopting the result BellSouth urges will create incentives that are inconsistent with the Commission's goals for expanded interconnection. Permitting the unlawful tariffed rates to become effective will reward the LECs for their failure to cooperate and delay the competitive benefits of expanded interconnection. For these reasons, BellSouth's petition for reconsideration must be denied.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Local Exchange Carrier's Rates,	)	CC Docket No. 93-162
Terms and Conditions for Expanded	)	Phase I
Interconnection for Special Access	)	

OPPOSITION TO BELLSOUTH'S PETITION FOR RECONSIDERATION

The Association for Local Telecommunications Services ("ALTS") hereby submits its Opposition to BellSouth's Petition for Reconsideration ("BellSouth Petition")[1] of the Commission's Interim Prescription Order in Docket No. 93-162 rejecting the local exchange carriers' ("LECs'") proposed rates for special access expanded interconnection and imposing an interim rate prescription.[2]

I. INTRODUCTION

BellSouth claims that the LECs proposed rates should have been permitted to become effective at the expiration of the five-month suspension period. It alleges that the Commission has exceeded its statutory authority by creating an interim rate prescription without reaching a conclusion that the LECs' proposed rates are unreasonable. BellSouth points to the fact that the Commission found that the LECs had not submitted sufficient

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[1] Petition for Reconsideration in CC Docket No. 93-162, Phase I (filed December 13, 1993). Comments were requested by Public Notice DA 94-13 (January 5, 1994).

[2] *In the Matter of Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection for Special Access*, 8 FCC Rcd 8344 (1993) ("*Interim Prescription Order*").

justification for their rates but then erroneously claims that the Commission did not reach a definitive conclusion that the LECs rates were unjust and unreasonable and therefore unlawful.[3] Thus, BellSouth's petition misstates the Commission's conclusions in the *Interim Prescription Order*, misapplies statutory requirements and relevant case law and therefore must be denied.

The BellSouth Petition is a rather transparent continuation of the LECs' intransigent opposition to implementation of expanded interconnection. The net effect of the BellSouth petition is to insist that Congress intended to permit a LEC to refuse to submit sufficient evidence to enable the Commission to find its proposed rates just and reasonable and then to require that those rates become effective. That approach would stand the statutory scheme on its head by rewarding defiance of the statutory requirements that rates be just and reasonable and by inflicting unjust and unreasonable rates upon the consumer.

Not only is BellSouth's argument contrary to the clear intent and structure of Title II of the Communications Act, it is plainly contrary to the wording of Section 204 when interpreted in light of what the *Interim Prescription Order* actually held (and not what BellSouth claims it held). The LECs should not be permitted to take advantage of their failure to present probative evidence on the issue of the tariff's reasonableness. The Commission should halt the LECs' gamesmanship by denying BellSouth's Petition and affirming that the LECs must continue to offer expanded interconnection under the rates specified in the *Interim Prescription Order* (until a different prescription is promulgated).

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[3] BellSouth Petition at 4-7.

II. THE *INTERIM PRESCRIPTION ORDER* CONFORMS WITH STATUTORY RATE INVESTIGATION AND PRESCRIPTION REQUIREMENTS

A. The Commission Found That The Proposed LEC Rates Were Unjust And Unreasonable And This Finding Empowered It To Reject The Tariffs Under Section 204 of the Act.

BellSouth maintains that the Commission choose to proceed under Section 204(a) of the Act but failed to adhere to its requirements.[4] BellSouth relies upon that part of Section 204(a) which states; "If the [investigation] proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, . . . shall go into effect at the end of such period." BellSouth claims that the *Interim Prescription Order* failed to conclude that the LECs expanded interconnection tariffs were unjust, unreasonable, and, therefore, unlawful. BellSouth maintains that the thrust of the Commission's decision was that it had insufficient information to make a final determination regarding the reasonableness of the filed rates or to prescribe permanent just and reasonable rates.[5] BellSouth then argues that the Commission could not decide whether the proposed rates were either just and reasonable or unjust and unreasonable.[6] BellSouth concludes that, because the five month suspension period has expired without, it claims, any conclusion of the investigation, the Commission was required to permit the

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[4] Section 204 of the Act prescribes the procedures the Commission must follow in suspending and investigating proposed tariffs. Section 204 imposes the burden of proof of reasonableness on the LECs. That section provides in relevant part that "If the [investigation] proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge . . . shall go into effect at the end of such period." 47 U.S.C. § 204(a)(1).

[5] BellSouth Petition at 6.

[6] *Id.* at 7.

proposed rates to become effective as mandated by Section 204 of the Act.[7]

BellSouth's syllogism is based upon an erroneous factual premise and thus is fatally flawed. Contrary to BellSouth's assertions, the Commission has conducted this investigation in harmony with the Act's requirements. It suspended the expanded interconnection tariffs of the LECs, initiated a hearing, designated issues, permitted the LECs to present direct cases and rebuttal, and reached a definitive conclusion regarding the lawfulness of the LECs rates. The Commission's *Interim Prescription Order* repeatedly found that the LECs' expanded interconnection rates were unjust, unreasonable and therefore unlawful under the Act:

> [W]e find that the LECs have not demonstrated that their originally filed rates for expanded interconnection are just and reasonable in compliance with the Communications Act, and we therefore find those rates to be unlawful . . .;[8]

> [W]e must find the LECs' rates for expanded interconnection unjust and unreasonable, and therefore unlawful.[9]

If there were any doubt as to the Commission's finding, it was made clear in the ordering clause which states:

> IT IS ORDERED . . . that the rates for expanded interconnection service filed . . . by the local exchange carriers subject to this Order are unjust unreasonable and therefore unlawful.[10]

These findings admit of no doubt that BellSouth mischaracterizes the Commission's

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[7] *Id.* at 8.

[8] *Interim Prescription Order* at 8346.

[9] *Id.* at 8356.

[10] *Id.* at 8364-65.

conclusions in the *Interim Prescription Order*. The Commission had sufficient information to make a final determination regarding the reasonableness of the filed rates and did so. The Commission was unequivocal in its conclusion that the expanded interconnection tariffs were unjust, unreasonable, and, therefore, unlawful.[11]

The Commission's equivocation was not related to the question of the lawfulness of the proposed rates but rather to its ability to prescribe permanent rates. The Commission concluded that, due to the LECs' failures to be forthcoming, it "lack[ed] sufficient information to make a permanent rate prescription."[12] The Commission's inability to prescribe a final rate does not undermine the validity under Section 204(a) of the Commission's conclusion that the proposed rates were unlawful.

Moreover, because the LECs bear the burden of proof to demonstrate that their proposed rates are just and reasonable, where the LECs have failed to meet that burden after multiple opportunities (as BellSouth rather blithely admits),[13] the inescapable conclusion is that the rates are unjust and unreasonable. The failure to meet the burden of proof is sufficient for the Commission to conclude that the rates were unlawful.[14]

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[11] It is noteworthy that BellSouth, perhaps unknowingly, admits in its petition the Commission found the LECs rates to be unjust and unreasonable: "Despite the [*Interim Prescription Order's*] language that the expanded interconnection are 'unjust and unreasonable,' the Commission's discussion makes it clear that the finding made in the investigation was that the LECs had not met their statutory burden of showing that the rates were just and reasonable." BellSouth Petition at 6.

[12] *Interim Prescription Order* at 8360.

[13] Bell South appears unconcerned that the Commission lacked sufficient information from the LECs to prescribe interim rates, notwithstanding the Commission's repeated attempts to wrest such information from them. BellSouth contentedly attempts to marshall this aspect of its own intransigence to its cause as well.

[14] *American Telephone and Telegraph Company*, 88 FCC 2d 1656 (1982).

The purpose underlying BellSouth's rewrite of the *Interim Prescription Order* and findings is clear -- its factual mischaracterization is an effort to recast the Commission's decision in a form that will fit within the court case upon which Bell South relies, *MCI v. FCC.*[15] This effort is unavailing for the simple reason that the critical factual underpinnings between the *MCI* case and the *Interim Prescription Order* are not the same.

In the Commission's *MCI* decisions preceding the Court of Appeals case, the Commission repeatedly asserted that certain AT&T tariffs were "unlawful and null and void," but nevertheless permitted the tariffs to remain in effect for three years. The court criticized the Commission for permitting the tariffs to continue in effect despite its conclusion that ". . . the tariff schedules . . . are found unlawful as indicated herein, [and] are NULL AND VOID, effective 210 days after publication of this Decision in the Federal Register."[16] The court remanded the decision to the Commission for the adoption of a schedule leading to an early termination of the proceedings.

The decisionally critical difference between the *MCI* case and the instant case is that at no time did the Commission in the *MCI* case actually conclude that the AT&T tariffs were unreasonable. The court concluded that "a filed tariff . . . not found by the FCC to be either just and reasonable or unjust and unreasonable . . . can avoid the stigma of unlawfulness" at least for a reasonable amount of time until an alternative is developed.[17] The teaching of the *MCI* case is that, where the Commission has not reached

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[15] 627 F.2d 322 (D.C. Cir 1980). BellSouth Petition at 7.

[16] *MCI v. FCC*, 627 F.2d at 336, n.67 and accompanying text.

[17] *MCI v. FCC* at 338.

a conclusion regarding whether a tariff is just or reasonable, it is not obligated to reject the tariff.

That is not the case here. The *MCI* conclusion is inapplicable because the Commission unequivocally concluded in the *Interim Prescription Order* that the LECs rates were unlawful because they were unjust and unreasonable. The *MCI* case in fact supports, rather than undermines, the Commission decision here. *MCI* requires the result the Commission reached in the *Interim Prescription Order*. The *MCI* court stated: "had we read the FCC's 1976 decision as actually finding AT&T's . . . tariff revisions 'unjust and unreasonable' on their merits, we conclude that the prohibition of unjust and unreasonable tariffs in Section 201(b) of the statute would prevent the FCC from continuing those revisions in effect."[18] Thus, the Commission was compelled to reach the instant result and has complied with statutory and judicial requirements.

B. The Interim Prescription Of Rates Was A Proper Exercise Of The Commission's Authority Under Section 4(i) Of The Act And Ancillary To Its Authority Under Section 205 Of The Act To Require Interconnection At Just And Reasonable Rates And To Prescribe Lawful Rates.

BellSouth maintains that the Commission cannot prescribe interim rates under Section 4(i)[19] and Section 205[20] of the Act. BellSouth generally argues that the interim prescription is inconsistent with the statutory requirements of Sections 204 and 205 and thus the more general provisions of Section 4(i) cannot provide a basis for the

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[18] *Id.* at 338.

[19] Section 154(i) gives the Commission authority to "issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. §154(i).

[20] 47 U.S.C. §205(a).

Commission's action. BellSouth maintains that, "a rate prescription, even for an interim period, may be entered only after a full opportunity for hearing and that the rate to be prescribed will be just and reasonable [sic]." BellSouth contends that neither condition has been met - that is, the Commission did not yet conduct the required hearing or prescribe just and reasonable rates.[21]

Before reaching this conclusion BellSouth appears to argue that the Commission cannot prescribe rates in this instance, if for no other reason, because it was compelled to permit the LECs proposed tariffs go into effect. Thus, in BellSouth's view, invoking Section 205 of the Act was improper because the LECs' proposed rates for expanded interconnection were required to become effective at the end of the suspension period. To the extent this is BellSouth's argument, ALTS has demonstrated above that this simply is not the case.

Moreover, it appears that the Commission's proceeding did satisfy both conditions under Section 205, even though it continues to seek from the LECs sufficient information with which to prescribe final rates. First, BellSouth has had a full opportunity for a hearing. That was the purpose of the investigation culminating in the interim rate prescription. As discussed, *supra*, in reaction to its initial conclusion that the expanded interconnection tariffs might be unreasonable, the Commission: initiated a hearing; designated issues; permitted the LECs to present lengthy and detailed direct cases based upon specific Commission directions and matrices; permitted in a separate detailed order

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[21] BellSouth Petition at 9. At one point, BellSouth appears to concede that the Commission generally has the authority to adopt an interim prescription, but argues that the Commission has violated the procedure set forth in the Act in this instance.

the LECs' rebuttal to defend their tariffs; and only then reached a conclusion regarding the lawfulness of the LECs rates. Despite repeated requests by the Commission, including specific instructions regarding the form and content of the information it sought, the LECs failed to supply cost information sufficient to prescribe final rates. It is disingenuous then for BellSouth to imply that the LECs have not had multiple opportunities to be heard.

Second, BellSouth's claim that the interim prescription does not satisfy the Section 205 requirement that the prescribed rate be just and reasonable is misplaced. BellSouth claims that the two-way adjustment mechanism would in effect lead to a determination that the interim prescription was unreasonably high or unreasonably low. BellSouth argues in this regard that use of the adjustment would move the interim rate either up or down, meaning that the original interim rate must have been either too low or too high and, thus, unreasonable.

BellSouth urges an unnecessarily restrictive interpretation of Section 205. That section provides the Commission substantial latitude when structuring a rate prescription. Section 205 permits the Commission "to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges . . .."[22] The Commission was well within the requirements of the statute when it imposed a maximum overhead rate level based on ARMIS fully distributed cost overhead levels. It concluded that these represent a verifiable and reasonable surrogate for the upper limits of the overhead loading factors for the purposes of the interim prescription.[23]

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[22] 47 U.S.C. Section 205(a). (emphasis added).

[23] *Interim Prescription Order* at 8360.

Furthermore, as BellSouth recognizes, the Commission did not rely solely or even primarily upon Section 205. Its principal support was its Section 4(i) authority. The Commission has previously relied on the general discretionary authority conferred by Section 4(i) to prescribe interim rates including retroactive two-way adjustment mechanisms.[24] The Commission's ancillary power pursuant to Section 4(i) to impose an adjustable interim rate is derived from the Commission's mandate to determine the reasonableness of rates and suspend them pending further investigation if doubt exists. These actions do not depend upon an express grant of statutory authority to be valid,[25] as several cases have held.

The Commission thoroughly discussed, in *Lincoln Telephone and Telegraph v. FCC*, the issues raised by BellSouth regarding reliance on Section 4(i) of the Act to impose interim rates and utilize a two-way adjustment mechanism. The Commission concluded in *Lincoln* that Section 4(i) confers sufficient authority to support the imposition of interim rates as an ancillary exercise of the Commission's Section 205 prescription authority.[26] The Commission's analysis was affirmed by the court, which concluded that the prescription of interim rates was an appropriate exercise of the Commission's residual authority, granted in Section 4(i) of the Act.[27]

BellSouth recognizes that the *Lincoln Telegraph* case creates a large obstacle to the

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[24] *AT&T and the Bell System Operating Companies, Exchange Network Facilities for Interstate Access*, 93 FCC 2d 739 (1983). ("*ENFIA*").

[25] *Id.* at 762.

[26] *Lincoln Telephone*, 72 FCC 2d 724 (1979).

[27] *Lincoln Telephone and Telegraph v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981) ("*Lincoln*").

success of its argument. It contends, therefore, that the Commission's reliance on *Lincoln Telegraph* is misplaced.

In *Lincoln*, MCI sought interconnection privileges from Lincoln Telephone in order to expand the reach of its Execunet services. Because no tariffs were in effect that identified the rates for interconnection, MCI and Lincoln Telephone were directed by the Commission to reach agreement regarding the terms and conditions of interconnection. They failed. The Commission was forced to impose interim interconnection rates until a final interstate interconnection tariff could be crafted and filed or prescribed. BellSouth appears to maintain that the distinction between *Lincoln* and the instant case is that, in *Lincoln*, no tariffs for interconnection services existed at the time of the Commission's decision. Thus, the *Lincoln* Commission was required to impose an interim solution until appropriate tariffs could be filed, whereas, in the instant case, or so BellSouth claims, "interconnection was already available pursuant to effective tariffs."[28]

This position is unavailing for several reasons. First, it is belied by the facts. Here, as in *Lincoln*, there were no tariffs in effect that permitted expanded interconnection at the time that the Commission prescribed interim rates. Second, the underlying goal of *Lincoln* is harmonious with the results the Commission intends to achieve through expanded interconnection -- ensuring the opportunity for immediate interconnection in the face of delay and unreasonable rates.[29] Thus the interim rates specified by the

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[28] BellSouth Petition at 12.

[29] *Lincoln Telephone* at 730, *aff'd. Lincoln Telephone and Telegraph v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981).

Commission in the *Interim Prescription Order* and the procedures it utilized to establish those rates are well within the Commission's authority under Section 4(i) of the Act and ancillary to its authority under Section 205 of the Act.

III. THE RESULT BELLSOUTH URGES CREATES PERVERSE INCENTIVES THAT ARE INCONSISTENT WITH THE COMMISSION'S GOALS FOR EXPANDED INTERCONNECTION AND THE PUBLIC INTEREST.

The Commission was presented with somewhat of a Hobson's choice after completing its investigation of the proposed LEC tariffs and concluding they were unlawful. It was confronted with the task of determining an appropriate solution in the face of unlawful rates and LECs that continued to delay the initiation of expanded interconnection.[30] On the one hand, the Commission could have rejected the tariffs and required the filing of new expanded interconnection tariffs. This choice would have rewarded the LECs for their defiance and for some length of time denied competitors and customers the benefit of expanded interconnection. On the other hand, the Commission could have permitted the LECs unlawful tariffs to become effective. This choice would have violated the statute, and the directives of the *MCI* court, and discouraged customers from taking expanded interconnection. Each of these choices would also delay the competitive benefits of expanded interconnection. Alternatively, the Commission could prescribe interim rates, benefitting competition and end users, ensuring rate stability, and achieving public interest goals. The choice was clear, and statutorily valid.

The Commission must not permit BellSouth to continue to delay the initiation of

[30] *Interim Prescription Order* at 8360.

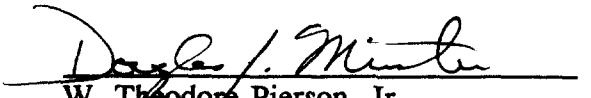
expanded interconnection. If BellSouth's analysis prevails, LECs will have additional incentive to withhold information in an effort to "game" the Commission's suspension and investigation process through dilatory tactics. Proceedings will move so slowly that the Commission would be forced to permit unjust, unreasonable, and unlawful tariffs to take effect at the end of the investigation period. This does harm to the intent of 204(a) and to the public interest. Therefore, BellSouth's petition for reconsideration must be denied.

IV. CONCLUSION

The interim prescription of expanded interconnection rates is an appropriate exercise of the Commission's statutory authority. BellSouth's Petition for Reconsideration should be dismissed.

Respectfully Submitted,

ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES



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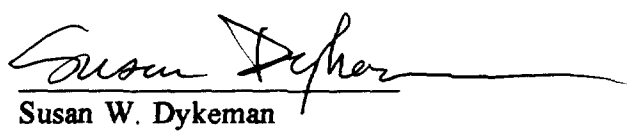
February 4, 1994

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 1994, copies of the foregoing MOTION TO ACCEPT LATE FILED PLEADING and OPPOSITION were served via facsimile and Federal Express**, hand delivery*, or first class mail, postage prepaid, to the parties on the attached service list.



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